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17 **UNITED STATES DISTRICT COURT**
18 **CENTRAL DISTRICT OF CALIFORNIA**

19
20 JAMES CARSON, ET AL.,

21
22 Plaintiffs,

23 vs.

24 CITY OF LOS ANGELES,
25 Defendant.

CASE NO. CV15-07057-JFW (KLSx)

PLAINTIFFS' REPLY
MEMORANDUM IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY
JUDGMENT

Hearing Date: September 19, 2016,
Time: 1:30 PM
Courtroom 16

**Pre-trial Hearing Date: October 7,
2016, 10:00 AM**
Trial Date: October 18, 2016, 8:30 AM

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I. Introduction

The City ignores the requirement that “[t]o qualify for exemption . . . an employee’s “primary duty” must be the performance of exempt work.” 29 C.F.R. 541.700(a) (April 23, 2004). The City asserts that the EMS Captains’ primary duty is “managing, overseeing and supervising the medical component of emergency response calls to ensure that the standard of patient care is met.” Document Number 56 (“Doc. No. 56”) at p. 3. But defendant fails to offer a single fact to show that EMS Captains manage or supervise anyone or anything other than while on-scene at an emergency call. Directing the work of other paramedics on scene is non-exempt work under the “first responder” regulation. Even the City’s lawyers admit as much in a letter to the City: “If the EMS Captains are very frequently on-scene, directing the response to incidents, then there is a good chance that the ‘first responder’ rule will render them non-exempt. This is particularly true if the types of activities and other support activities in the field make up over 50% of the Captains’ work.” Combined Statement of Facts (“CSF”) 84-88. As importantly, the EMS Captains’ primary duty of emergency response is neither office work or non-manual. Instead, it is dangerous, physical work in the field, not behind a desk.¹ As a matter of law, the highly compensated exemption cannot apply. 29 C.F.R. §541.601 (April 23, 2004) (to be exempt under the highly compensated exemption, an employee’s primary duty must include office or non-manual work).

¹ The position description describes the physical nature of the EMS Captain’s job: “Assigned members must be capable of moving sick and injured patients onto a gurney and into an ambulance; capable of heavy physical exertion including moving . . . heavy equipment; must be in good cardiovascular condition in order to carry . . . patients up and down numerous flights of stairs and across rugged terrain. The work environment will expose the member to various hazardous diseases and materials, physical danger, and other life-threatening circumstances in carrying out the scope of their duties.” CSF 41, 149.

1 The parties agree that the EMS Captains' primary duty is to respond to
2 emergency incidents as quickly as possible. CSF 2, 33. Of course, the EMS
3 Captains have to drop everything they are doing if they are toned out to an
4 emergency call. CSF 33-35. Based on this fact alone, emergency response is their
5 primary duty.

6 On scene, the EMS Captains render aid while supervising other paramedics
7 to make sure that patients are triaged, treated, and transported safely and in
8 accordance with the Los Angeles Fire Department's ("the Department") policies
9 and procedures. CSF 47, 53.

10 In an attempt to turn this vital emergency response work into "management
11 of the EMS division," defendant argues that the EMS Captains primary duty
12 includes: "overseeing the medical care provided," "supervising paramedics to
13 ensure that patients are properly cared for," "conducting and assisting with
14 investigations of complaints against paramedics," "training and counseling
15 paramedics," "managing narcotics for the LAFD's rescue apparatus," and "various
16 administrative duties including completing performance evaluations of paramedics
17 and ensuring consistent interpretation of and instruction on LAFD policies and
18 procedures regarding patient medical care." Doc. No. 56 at p. 3.

19 Based on the above list, however, plaintiffs are entitled to summary
20 judgment. To the extent that EMS Captains "oversee" or "supervise" medical care,
21 they do so on the scene of an emergency, working hands-on with paramedics at
22 dangerous incidents. CSF 2, 3, 46, 53, 54. EMS Captains must respond when
23 dispatched, and respond as often or more often than a rescue ambulance. CSF 33-
24 35, *see infra* at Section II.A.3. The EMS Captains are never Incident Commanders;
25 rather, they report to and carry out the orders of an Incident Commander. CSF 57.
26 This is non-exempt work under 29 C.F.R. §541.3(b) (April 23, 2004).

27 EMS Captains are not high level officials and do not "direct operations." *See*
28 Plaintiffs' Response to Combined Statement of Fact (P-CSF) 138, 160. They do not

1 manage or oversee the EMS subdivision; other, higher-ranking employees have
2 that role. CSF 15, P-CSF 135. Instead, the EMS Captains spend much of the shift
3 waiting to be told where to respond, and during daylight hours, spend their time
4 performing manual labor driving to restock ambulances with narcotics, while
5 remaining available for emergency response. CSF 2, 63, 66.

6 To the extent that EMS Captains “conduct and assist with investigations,”
7 which is rare at best, the work comprises fact-finding at the request of supervisors.
8 CSF 70, 71. This is non-exempt work. To the extent that EMS Captains “train and
9 counsel paramedics,” they train paramedics on skills and equipment necessary for
10 emergency response. CSF 68, 69. EMS Captains do not design training and are not
11 assigned to the training division. CSF 6, 23, 69. Instead, they relay pre-hospital
12 care medical skills in the field as instructed by the training division. CSF 68, 69.
13 This is non-exempt work. To the extent that EMS Captains “manage narcotics,”
14 they are *driving* some 80 - 100 plus miles a shift in City of Los Angeles traffic to
15 hospitals and to ambulances in the field, walking into hospitals, and restocking
16 rescue vehicles with narcotics that they need to continue to respond to
17 emergencies. CSF 63. EMS Captains do not determine the quantity of narcotics
18 each ambulance must have, do not recommend which narcotics must be used;
19 instead, they deliver the quantity of narcotics needed based on tightly controlled
20 procedures set forth in the Department’s rules and regulations – rules from which
21 the EMS Captains have no discretion to deviate. CSF 61, P-CSF 218. By the
22 defendant’s own admission, this is non-exempt work. CSF 101.

23 While the amount of time spent performing exempt work is not the only
24 factor in the exemption analysis, it is a useful guide. [29 C.F.R. §541.700\(b\)](#) (April
25 23, 2004). Here, the EMS Captains spend 99.66% of the time performing *non-*
26 *exempt work*, and any exempt work is of little relevance to the Department’s
27
28

1 business.² Because the EMS Captains' primary duty is emergency response and
 2 because the City cannot prove that their primary duty is exempt work, the highly
 3 compensated exemption does not apply pursuant to [29 C.F.R. §541.3\(b\)](#) and 29
 4 C.F.R. §541.601. As such, the Court should grant plaintiffs' motion for partial
 5 summary judgment with respect to the City's liability for unpaid FLSA overtime
 6 for hours worked in excess of 40 hours in a workweek.

7 The City cannot avoid mandatory liquidated damages under [29 U.S.C. §260](#),
 8 nor can it avoid a third year of backpay liability for its willful or reckless acts
 9 under [29 U.S.C. §255\(a\)](#). The City asserts that its acts were reasonable because it
 10 overpaid EMS Captains out of "generosity" for the time that it misclassified EMS
 11 Captains under [29 U.S.C. §207\(k\)](#). Doc. No. 56 at 24-25. The City's "generosity"
 12 is only such if EMS Captains are exempt, which they are not, as evidenced by the
 13 City's decision to begin paying them overtime pay for hours in excess of 40 in a
 14 workweek in July 2015.

15 The City never came to any conclusion regarding the EMS Captains' exempt
 16 status, never paid the EMS Captains pursuant to the highly compensated
 17 exemption, and instead, *knowingly* misclassified them as partially exempt fire
 18 fighters under 29 U.S.C. §207(k) until July 2015. CSF 19, 112, 113. The City's acts
 19 were not objectively reasonable, and they were not in good faith. As a serial
 20 violator of the FLSA, the City's acts, in light of its negligible attempts to determine
 21 the day-to-day duties of the EMS Captains, were willful or reckless.

23
 24 ² EMS Captains may spend six to ten hours a year completing portions of annual
 25 evaluations (which have no impact on an employee's final rating). This work
 26 cannot be more valuable to the City than the EMS Captains' emergency response
 27 work, which, using the City's own data, is a *daily* duty. The City's attempt to
 28 amplify the number of hours spent on performance evaluations by arguing that
 EMS Captains "spend many hours during the year evaluating paramedic
 performance in the field" (Doc. No. 56 at p. 19) is unavailing. CSF 77.

1 II. Argument

2 A. EMS Captains Are First Responders

3 1. The City Cannot Dispute that EMS Captains Are 4 Automatically Dispatched as the First Wave of Responders

5 EMS Captains have no discretion to refuse to respond when dispatched, and
6 must respond no matter what they are doing. *Compare* Doc. No. 49-22, Ex. 19, 69
7 Fed. Reg. 22,122 at 22,130 (April 23, 2004) *with* CSF 33-35. The only reason the
8 EMS Captains sleep at the fire station is to respond to emergencies. CSF 60. EMS
9 Captains are not dispatched to emergencies in order to simply evaluate paramedics
10 for field audits. CSF 77. It is common sense that emergency response is their most
11 important duty. *See Morrison*, 2016 U.S. App. LEXIS 11211 (4th Cir., June 21,
12 2016) at *34 (“Primary duty” has a common-sense meaning under the Part 541
13 regulations – ‘the principal, main, major or most important duty that the employee
14 performs.’”). *See also* [29 C.F.R. § 541.700\(a\)](#); *Morrison* at *25-26 (“[w]hatever the
15 precise importance of the Captains’ non-firefighting duties -- the evaluations, the
16 disciplinary reports, the annual conforming changes to station policies -- it is clear
17 that fighting fires is the more important part of the job. When an emergency call
18 comes in, it takes priority, and the Captains do not have discretion to decline to
19 respond.”).

20 EMS Captains respond to dangerous incidents, including multi-casualty
21 incidents, structure fires, and shootings (CSF 46); enter areas on scene designated
22 as “I.D.L.H.,” or “Immediate Danger Life Hazard” areas (P-CSF 150); carry and
23 don the same gear as paramedics (CSF 39, 40); are injured performing their first
24 responder work (CSF 42, P-CSF 165); perform hands-on work and, as licensed
25 paramedics, have a duty to provide medical aid. (CSF 47, 53-55).

26 The City fails to point to any facts to support its contention that the EMS
27 Captains manage or oversee the EMS subdivision (Doc. No. 56 at p. 17). This is
28 because the EMS Captains do *not* manage or oversee the EMS subdivision. They

are not responsible for staffing or hiring, do not assign work, do not determine shifts or overtime, do not prepare budgets or commit the department to contracts or other obligations. CSF 25-30. Instead, as first responders responding to emergencies, the EMS Captains carry out the day-to-day affairs of the EMS subdivision, which is “[t]he delivery of life saving emergency medical services.” CSF 146; *see Calderon v. Geico Gen. Ins. Co.*, 809 F.3d 111, 124 (4th Cir. 2015) (“critical focus [of the Administrative exemption] . . . remains whether an employee's duties involve the running of a business as opposed to the mere day-to-day carrying out of the business’s affairs.”) (citations omitted).

2. The City Misinterprets the First Responder Regulation and the EMS Captains’ Job Duties

Defendant mischaracterizes plaintiffs’ argument. Doc. No. 56 at p. 13. Plaintiffs do not assert that *every* LAFD employee who responds to an emergency is FLSA non-exempt as a first responder. Instead, plaintiffs argue that management-like tasks undertaken in conjunction with, or directly related to, first responder duties do not turn a first responder into an exempt employee. *Morrison*, 2016 U.S. App. LEXIS 11211 at *20, citing *Mullins v. City of New York*, 653 F.3d 104 at 115 (2d Cir. 2011); *see also* Doc. 49-1 at pp.7-8. Plaintiffs do not dispute that Fire Chiefs, Deputy Chiefs, and other high-ranking officers whose job it is to actually *manage* the Department, by hiring, transferring, or firing employees, setting budgets, and determining Department goals, are exempt, even if from time to time they are dispatched. Such high-ranking officers seldom respond, and when they respond, they direct operations by taking charge of scenes, including determining if additional resources are necessary. *See Maestas v. Day & Zimmerman, LLC*, 664 F.3d 822, 829 (10th Cir. 2012); *Maestas v. Day & Zimmerman, LLC*, 972 F. Supp. 2d 1232, at 1243, 1250 (D.N.M. 2013). Plaintiffs have brought personnel-related complaints to such high-level managing officials. P-CSF 135.

1 But plaintiffs are not those high-ranking officers. Instead, plaintiffs are
2 Captain-level paramedics (at least *five ranks below* the Fire Chief) who respond to
3 emergency incidents several times a day, as often as some paramedics, and report
4 to Incident Commanders on-scene. CSF 57; P-CSF 172, 176, 190. EMS Captains
5 are never Incident Commanders. P-CSF 161.

6 The primary role of the EMS Captain on a scene is to ensure that treatment,
7 transport, and triage of victims or patients is administered in accordance with the
8 rules and regulations governing them as paramedics. CSF 47. The City without
9 citation argues that this is an admission that the EMS Captains are exempt
10 managers. Doc. No. 56 at p. 12. Rather, such emergency medical response is non-
11 exempt work, as it is the responsibility of *all* paramedics responding to incidents to
12 ensure that treatment, transport, and triage of victims is administered in accordance
13 with the rules and regulations. Such work is non-exempt under the DOL's own
14 interpretation of 29 C.F.R. §541.3(b).

15 In its incorrect interpretation of 29 C.F.R. 541.3(b), defendant makes the
16 same faulty argument for which the Second Circuit criticized the district court in
17 *Mullins*. Defendant asserts that the Department of Labor did not intend to depart
18 from "*the* established case law." Doc. No. 56 at p. 12. (emphasis supplied). But just
19 as the DOL pointed out in its amicus brief, and as the Second Circuit determined in
20 *Mullins*, such analysis ignores the definite article "this." [Mullins](#), 653 F.3d at 118.

21 The Preamble recognizes that "[m]ost of the courts facing this issue have
22 held that . . . paramedics and EMTs . . . are not exempt because they usually cannot
23 meet the requirements for exemption as executive or administrative employees."
24 69 Fed. Reg. 22,122 at 22,129. DOL goes on to describe cases in which public
25 safety employees including those at the rank of Captain were held to be FLSA non-
26 exempt. For example, DOL cites with approval, [Department of Labor v. City of](#)
27 [Sapulpa, Oklahoma](#), 30 F.3d 1285, 1288 (10th Cir. 1994) as a case where "fire
28 department captains were not exempt executives because they were not in charge

1 of most fire scenes; had no authority to call additional personnel to a fire scene; did
 2 not set work schedules; [and] participated in all the routine manual station
 3 duties[.]” *Id.* DOL also cited with approval [Reich v. State of New York, 3 F.3d 581](#),
 4 585-87 (2d Cir. 1993) where police officers were non-exempt because their
 5 primary duty was conducting investigations and not administering the affairs of the
 6 department itself. *Id.* After citing cases in which the claimed exemptions did **not**
 7 apply, DOL stated that it “has no intention to depart from **this** established case
 8 law.” *Id.* (emphasis added). In using the definite article “this” the DOL was
 9 referring case law in which public safety workers were held to be non-exempt.

10 As the DOL continued:

11 Rather, for the first time, the Department intends to make clear . . . that such
 12 . . . paramedics, EMTs and other first responders are entitled to overtime pay.
 13 Police sergeants, for example, are entitled to overtime pay even if they direct
 14 the work of other police officers because their primary duty is not
 15 management or directly related to management or general business
 16 operations[.]

17 *Id.*³

18 Defendant misleads the Court by citing **any** case in the Preamble as if the
 19 DOL had ratified that particular case. Doc. No. 56 at p. 12. The DOL does not cite
 20 with approval the same the cases that defendant relies on. Instead, the cases
 21 defendant relies on appear in a list of cases showing the **exception** to the rule that
 22 public safety personnel whose primary duty is emergency response, no matter their
 23 rank or pay level, are covered by the FLSA. The exception is for “high-level police
 24

25 ³ DOL specifically goes on to state that public safety employees, including
 26 paramedics, “also cannot qualify as exempt under the highly compensated test in
 27 final section 541.601 because their primary duty does not include “office or non-
 28 manual work.” *Id.*

and fire officials” whose primary duty is management. For example, Smith v. Jackson, 954 F.2d 296 (5th Cir. 1992) is easily distinguishable because in *Smith*, the plaintiffs were district chiefs and battalion chiefs, some of the highest ranking officers, and when they arrived on a scene, there were “in charge.” Smith, 954 F.3d at 299.

3. Relative Frequency of Dispatch is Not Relevant, and the City’s Dispatch Data Offers a Misleading Comparison

The City advances a specious and irrelevant statistical comparison, comparing a single EMS Captain position to up to 14 rescue ambulances in a battalion, combined. The data, to the extent that it is relevant or admissible, actually shows that single EMS Captains respond as many times as some single rescue ambulances, and in some cases more. *Compare* Doc. No. 56-10 at p. 29 *with* Doc. No. 56-10 at p. 31. The same data shows a large variation in response frequency even between rescue ambulances. *See id.* at p. 31. The City cannot argue that paramedics staffing a rescue ambulance that responds less frequently than others should be treated differently under the FLSA, and the same argument also fails when applied to EMS Captains.

This is because the relative frequency of dispatch or time spent responding is not the key consideration. In Morrison, EMS Supervisors spent between 58 and 70 minutes responding to emergencies per 24-hour shift; those EMS Supervisors were still FLSA non-exempt first responders because that emergency response work was their most important duty. *See* Doc. No. 49-1 at p. 17-18; Doc. No. 49-24 at p. 39.

Even if relative frequency was relevant, the City wrongly states that EMS Captains respond “once or twice a day.”⁴ Doc. No. 56 at p. 17. This imprecise

⁴ Responding once or twice a day to serious emergency incidents, at which there may be multiple patients to be treated by rescue personnel on-scene, including the EMS Captains, is nothing to be belittled, and is the EMS Captains’ primary duty.

statement appears to be based on emergency responses for one battalion. EMS Captains, however, respond to incidents for two battalions. CSF 31, 131, 132. For example, using the City's data, a 24-hour EMS Captain responds to emergency dispatches for Battalion 13 and for Battalion 6 when a 10-hour EMS Captain is not on duty. CSF 131, 132, P-CSF 173-176. In 2012, EMS Captains purportedly responded to 1608 incidents in Battalion 13, and 722 incidents in Battalion 6. Doc. No. 56-10 at p. 30. Based on the City's data, then, the Battalion 13 EMS Captain likely responded to over 2,000 incidents in 2012, approximately 5.5 times a day, more than many of the rescue ambulances in the Department.

B. EMS Captains Do Not Perform Exempt Managerial Tasks

1. Tasks that Could be Colloquially Referred to as Managerial are Non-exempt when Related to Emergency Response

Several tasks that the EMS Captains perform, including fact-finding, training, and restocking, that the City alleges to be exempt management work, are in fact non-exempt work related to first response. *See Morrison*, 2016 App. LEXIS at *30, n.8 (“non-supervisory duties that relate to ensuring operational readiness for first response also are non-exempt under the relevant regulations, even if they might be described colloquially as ‘management’”); *Barrows v. City of Chattanooga*, 944 F. Supp. 2d 596, 604 (E.D. Tenn. 2013) (explaining that conducting training and assuring a constant state of preparedness directly relates to regular front line duties and are therefore non-exempt work).

2. Restocking Requires Extensive Driving and Walking, and is Manual Work

The City's argument is especially weak on the issue of the EMS Captains' restocking duties. The City makes a poor attempt to explain away its prior, honest, advice that restocking work is non-exempt. The City argues that because its conclusion was in a draft legal opinion, the City's outside attorneys *could* have

1 changed their minds. Doc. No. 56 at p. 20. (“The language *could* have been
2 removed because ‘restocking’ was deemed exempt work.”) (emphasis added).

3 First, the City is wrong. The language regarding restocking narcotics being
4 non-exempt work appeared in a January 11, 2012 draft letter, and remained in a
5 March 12, 2012 draft. P-CSF 241. The March 12, 2012 draft only contained
6 additional comments from the City.⁵ P-CSF 241. The March 12, 2012 draft was the
7 last draft the City saw. *Id.* The very same lawyers representing the City in this
8 lawsuit drafted those letters. *See* Doc. No. 28, Declaration of Lead Counsel and
9 P-CSF 241. Yet, the City’s only response to the admission that restocking work is
10 non-exempt is that the advice *could have* been removed in a later draft. Such a
11 conjecture makes no sense. More likely, the language was removed because such
12 extensive time spent performing non-exempt narcotics delivery is yet another death
13 knell to the City’s defense. If anything, defendant’s argument should give rise to an
14 inference that the City understood and ignored its culpability.

15 Defendant’s reliance on [*Miller v. Farmers Ins. Exch.* 481 F.3d 1119 \(9th Cir.](#)
16 [2007](#)) is misplaced. The plaintiffs in *Miller* were claims adjusters who, unlike the
17 EMS Captains here, made decisions “directly related to management policies or
18 general business operations” and were directly covered by the administrative
19 exemption, which contemplated claims adjusters as exempt. [*Miller v. Farmers Ins.*](#)
20 [Exch., 481 F.3d 1119, 1128 \(9th Cir. 2007\)](#). The *Miller* court never needed to
21 address whether the driving time by the claims adjusters was non-exempt work.
22
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24
25

26 ⁵ While there was a draft letter dated January 23, 2014, the City’s attorney admitted
27 that this draft was merely a copy of a previous letter, and was never sent to the
28 City. CSF 241. The attorneys never delivered a final draft. *Id.*

C. The City's Cannot Avoid Liquidated Damages or a Third Year of Liability With Its Advice of Counsel Defense

The facts show that the City cannot meet its burden to show good faith or objective reasonableness to avoid mandatory liquidated damages. If the City did review dispatch data as it claims to have done, it produced no studies and no written analyses, and if such analysis was anything similar to Captain Everett's Declaration, its analysis was flawed. *See supra* at Section II.A.3.

The City's only attempt to demonstrate good faith is to assert that it communicated with legal counsel. Doc. No. 56 at 22-23. This argument fails as a matter of law because the City did not disclose material facts to its attorneys, the attorneys never provided a conclusion regarding the highly compensated exemption, and the City did not rely on any advice it did receive. *See* CSF 85-87, 90-107. [*United States v. Bush*, 626 F.3d 527, 539 \(10th Cir. 2010\)](#). The City even acknowledged that more investigation was necessary. CSF 110. Yet there is no evidence of any further investigation.

The City admits that its counsel never provided it with a final opinion on the EMS Captains' exempt status, and no document exists concluding that the EMS Captains were subject to the highly compensated exemption. CSF 112, 113. The City's *ipse dixit* statement that it concluded EMS Captains were exempt as highly compensated employees is insufficient to avoid mandatory liquidated damages. For the same reason, and because the City is a serial violator of the FLSA, the City cannot avoid a third year of liability.

III. Conclusion

For the foregoing reasons, plaintiffs respectfully request that the Court grant their motion for partial summary judgment as to the issue of liability. Plaintiffs also respectfully request that the Court grant their motion for partial summary judgment as to liquidated damages and make-whole relief for the three-year period for recovering their unlawfully withheld overtime compensation.

1
2 Dated: September 2, 2016
3

4 Respectfully Submitted,
5

6 /s/ Molly A. Elkin
7

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Certificate of Service

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